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IN THE

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL COALITION FOR UNIVERSITIES IN THE PUBLIC INTEREST, MOISES VAZQUEZ, ARMANDO DURON, THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA AND THE CALIFORNIA IMMIGRANT WORKERS' ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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The National Coalition for Universities in the Public Interest ("NCUPI"), Moises Vazquez, Armando Duron, the ACLU of Southern California and the California Immigrant Workers' Association, respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 19, 1993.[1]

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[1] Written consents from counsel for petitioner and respondents to the filing of the brief have been filed with the Clerk's office.

INTERESTS OF THE AMICI CURIAE

NCUPI is a non-profit organization founded by Ralph Nader and Professor David Noble in 1983. NCUPI supports the educational mission of universities nationally, and seeks to protect faculty from fraud, misconduct and discrimination in employment. NCUPI, Moises Vazquez, Armando Duron, the ACLU Foundation of Southern California, and the California Immigrant Workers' Association currently represent Dr. Rodolfo F. Acuña, an employment discrimination plaintiff in the State of California who has sued the Regents of the University of California, the University of California at Santa Barbara and the individual administrators and professors who reviewed and denied his application for employment as a Professor of Chicano Studies. Dr. Acuña alleges that defendants' denial was impermissibly based on his race, national origin, age and political views in violation of both federal and state employment discrimination law.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in *Miller v. Maxwell's International Inc. et al.*, 991 F.2d 583 (9th Cir. 1993) ignores the plain meaning of the definitions of both "person" and "employer" in both Title VII and the ADEA and guts the legislative intent of both civil rights statutes. It also disregards its own doctrine that Title VII and the ADEA be liberally construed to effect their remedial purposes; disregards the Code of Federal Regulations' provision that Title VII be liberally contrued to effect its purpose; flys in the face of the 1972 Amendments to the Civil Rights Act of 1964, which extended remedies to public employees and to educational institutions; and ignores the Civil Rights Act of 1991, which seeks to strengthen remedies for employment discrimination.

Under the court's decision in *Miller v. Maxwell's Int'l Inc. et al.*, victims of discrimination are prohibited, *ab initio*, from suing those individuals who were involved in the discriminatory acts. Petitioner Miller was barred from seeking any remedy from the individual supervisors and co-workers who discriminated against her.

The court's decision in *Miller v. Maxwell's Int'l Inc. et al.*, creates separate and unequal remedies under Title VII. This Court should grant petitioner's writ for certiorari and reverse the decision of the Ninth Circuit in *Miller v. Maxwell's Int'l Inc. et al.*

I. THE NINTH CIRCUIT'S DECISION UNDERMINES THE ENFORCEMENT OF TITLE VII AND THE ADEA IN THE NINTH CIRCUIT

The Ninth Circuit's decision in *Miller* forecloses relief against an entire class of defendants in the largest Federal circuit in the nation. As that decision has been understood by the Federal district courts in the Ninth Circuit, individual supervisory employees can never be held liable in their personal capacities and some courts have held that they cannot be held liable in their official capacities.

In *Coulter v. City of Berkeley*, No. C-92-5062-MHP, 1993 U.S. Dist. LEXIS 10423 (N.D. Cal. July 26, 1993), the plaintiff brought suit against various officers of the Berkeley Police Department alleging that they had discriminated against him on the basis of his race and gender by withholding from him various benefits under the Department's sick leave and vacation leave policy. The court held that under *Miller v. Maxwell's Int'l Inc. et al.* the individual defendants could not be sued in either their individual or official capacities.

Similarly, in *Gauronski v. Busch Properties, Inc.*, CV 93-985-WMB, 1993 U.S. Dist. LEXIS 16254 (C.D. Cal. Oct. 13, 1993), the plaintiff brought suit under Title VII against her former employer and its chief executive officer, chief financial officer, a director and a corporate representative. The court held that the individuals could not be sued in either their individual or official capacities.

Amici represent Dr. Rodolfo Acuña, who is currently seeking remedies from the individual administrators and professors who reviewed and denied his application for employment as a Professor of Chicano Studies. U.S.D.C. for the Central District CV 92-1548 (HLH).

In or about June 1991, Dr. Rodolfo F. Acuña, was denied employment as a full Professor of Chicano Studies at the University of California at Santa Barbara. On September 25, 1992, Dr. Acuña filed suit in the Superior Court of Alameda County alleging that the Regents of the UC and UCSB, the public "corporate entities" as well as those individual administrators and professors who participated in the review and denial of his employment application, had discriminated against him on the basis of his race, national origin, age and political activities and views. Dr. Acuña sought relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; Article I, § 2 of the California State Constitution, and the California Fair Employment and Housing Act, § 12900 *et seq.* Dr. Acuña named the individual defendants because they were the people who discriminated against him. Dr. Acuña's federal action was subsequently transferred to the United States District Court for the Central District (Hupp, Harry L.) and his state action transferred to the Superior Court of Santa Barbara County (Stevens, Ronald C.).

On June 16, 1993, defendants the Regents of the UC, UCSB and individual defendants moved to dismiss Dr. Acuña's federal action. The public corporate entities argued that they were not responsible for the denial of Dr. Acuña's application, while the individual defendants argued that individual defendants could not be sued in their personal capacities under Title VII and the ADEA. Plaintiff Dr. Acuña opposed the motion and contended that the Ninth Circuit's decision conflicted with its own doctrine which permitted suit under Title VII and the ADEA against those individuals who were involved in the discriminatory acts alleged.

On July 12, 1993, the United States District Court for the Central District of California dismissed Dr. Acuña's suit against the individual defendants in their individual capacities, permitting suit against those same individuals only in their official capacities. Thus, Dr. Acuña was not permitted to seek any relief against the individual defendants in their personal capacities.

The Ninth Circuit's reconstruction of the provisions of Title VII and the ADEA guts the legislative intent of both civil rights

statutes and frustrates the amendments of 1972 and the Civil Rights Act of 1991. The decision is contrary to the plain language of both statutes and is not supported by the Ninth Circuit's rationale.

A. Title VII and the ADEA

The legislative intent in the enactment of Title VII of the Civil Rights Act of 1964 was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered ... stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) *citing*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

The legislative intent in the enactment of the Age Discrimination in Employment Act in 1967 was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991); *EEOC v. Wyoming*, 460 U.S. 227, 231-233 (1983).

B. The 1972 Amendments

In 1972 Congress amended the Civil Rights Act of 1964 to extend the remedies of Title VII to public employees and to educational institutions. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-448 (1976). "The 1972 Amendments retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf ... and made clear that that right was being extended to persons aggrieved by public employers." *Supra* at 449, n. 2. To effect this purpose, Title VII's statutory definitions of "person," "employer" and "employee" were revised as follows.

The definition of "person" in § 701(a) of Title VII was amended to include "governments, governmental agencies, [and] political subdivisions"; the phrase "a State or political subdivision" was stricken from the definition of "employer" in § 702 (b) and the

definition of "employee" in § 701(f) was amended to include individuals "subject to the civil service laws of a State government, governmental agency or political subdivision." *Id.* Thus, after 1972, Title VII offered remedies to all employees, irrespective of whether they were employed by the private or public sector.

C. Title VII's Statutory Definitions

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e provides the following definitions of "person", "employer" and "employee" for the purposes of this subchapter:

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501 (c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.
>
> (f) The term "employee" means an individual employed by an employer, except that the term "employ-

> ee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

In *Miller v. Maxwell's Int'l Inc. et al.*, the court effectively obliterated the entire section of Title VII which defines the term "person," *as that term must be used* in the term "employer" for the purposes of Title VII. *See*, 42 U.S.C. § 2000e(a). The Ninth Circuit thus unilaterally amended the statutory definitions of "person" and "employer." Indeed, 42 U.S.C. § 2000e (a) provides for sixteen different definitions of "person," only one of which was used by the Ninth Circuit, i.e. the definition of a corporate "person" as "employer." Pursuant to *Miller v. Maxwell's Int'l Inc. et al.*, corporations are the only "person" which meet the statutory definition of "employer." The ultimate result is that the term "employer" is artificially constrained and limited by the Ninth Circuit to be a corporate entity only.

The Ninth Circuit totally ignored the canons of statutory construction, which include at a minimum, giving effect to every word used by Congress. *Reiter v. Sonotone Corp.*, 442 U.S. 331, 339 (1979). "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Id., citing, United States v. Menasche*, 348 U.S. 528, 538-539 (1955). Certainly, it was possible for the Ninth Circuit to give effect to all relevant definitions provided in the term "person", including the definition "one or more individuals."

The Ninth Circuit also ignored its own doctrine which permits suit of those individuals who were involved in the discriminatory acts giving rise to the employment discrimination suit. *Sosa v. Hiraoka*, 920 F.2d 1451, 1458-1459 (9th Cir. 1990);

see also, Chung v. Pomona Valley Community Hospital, 667 F. 2d 788 (9th Cir. 1982).

Petitioner Miller who worked for Maxwell International Inc., a private employer, was allowed to sue the private corporate entity which employed her, but was prohibited from suing those individuals who were involved in the discriminatory acts, her supervisors and co-workers.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted and the decision of the Court of Appeals for the Ninth Circuit should be reversed.

November 26, 1993

Respectfully submitted,

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